IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.2905 OF 2004

Mohd.Ashraf Abdullah
K @ Farook .. Applicant
Vs.
The State of Maharashtra .. Respondent.

Mr.A.P.Mundargi for the applicant.
Mr.V.B.Konde-Deshmukh for the respondent.

CORAM : D.B.BHOSALE, J.

DATED : 10TH AUGUST, 2004

P.C.:

. Heard Mr.Mundargi, learned counsel for the applicant and Mr.Konde-Deshmukh, learned A.P.P for the respondent.

2. The applicant has approached this court for being enlarged on bail in Sessions Case No.411/2003 arising from C.R.No.404/2002 registered at Mata Ramabai Ambedkar Marg police station mainly under sections 302 read with 34 and 120-B of Indian Penal Code. It is the prosecution case that the applicant and three others hatched a conspiracy to do away with deceased - Shahaji and in pursuance thereof he was murdered on 18.12.2002 at 7.45 p.m. At the relevant time the deceased was going down

P.M. Road, Opposite Punjab National Bank on his Kinetic Honda. Apparently, the incident was an accident and in view thereof the crime was registered under section 304-A of Indian Penal Code. According to the four eye witnesses namely Raju Das, Sudhakar Pani, Mukesh Patel and Dinesh Paswan, the Kinetic Honda of the deceased skidded and he fell down. The post mortem report indicates that the deceased died of head injury which was caused in the said accident. However, during the investigation it was revealed that co-accused - Moin at the relevant time had fired shot at the deceased and though a bullet did not hit him, his motor cycle skidded and in the said accident he died. The supplementary statemeents of all the eye witnesses make reference to firing and also to other motor cycle rode by the co-accused - Moin and Irshad alongside the motor cycle of the deceased. It is the prosecution case that deceased - Shahaji was killed with a view to shut him off from giving evidence against the applicant in the N.D.P.S. case. The applicant was in jail at the relevant time as undertrial prisoner in the said case. The deceased - Shahaji was also initially arrested in the said N.D.P.S. case and was subsequently

discharged and shown as witness. According to the prosecution, the deceased was the star witness in the said case and, therefore, before he could depose against the applicant in the said case he was done to death. The N.D.P.S. case against the applicant ended in his acquittal.

3. Mr.Mundargi, learned counsel for the applicant submitted that even if all the allegations against the applicant are taken as true it would not constitute an offence under section 302 in view of the fact that the cause of death of deceased - Shahaji was not a firearm injury but it was due to the head injury caused in the accident. According to Mr.Mundargi, the case would at the most fall under the first part of section 307 and, therefore, he is entitled to be released on bail. He further submitted that there is no legally admissible evidence against the applicant to show that he conspired to do away with the deceased. In so far as the eye witnesses are concerned he took me through their supplementary statements recorded after more than two months stating that there was firing by two persons who were riding on another motor cycle alongside the motor cycle of the

deceased. In view of this Mr.Mundargi submitted that the evidenciary value of their statements is not only weak but even at this stage such evidence should be discarded outright. On the other hand Mr.Konde-Deshmukh, learned A.P.P. submitted that this is a case of strong motive coupled with the statements of witnesses who stated about the strained relationship between the deceased and the applicant. It was further submitted that though the cause of death is not a firearm injury, the accident occurred due to firing by the co-accused - Moin Ansari and, therefore, this case would fall under section 302 of Indian Penal Code.

4. While dealing with the case under section 120-B of Indian Penal Code a settled position of law would have to be borne in mind that generally a conspiracy is hatched in secrecy and it may be difficult to adduce direct evidence of the same. The prosecution would often rely on evidence of acts of various parties to infer that they were done in reference to their common intention. The prosecution would also more often rely upon the circumstantial evidence. The conspiracy can be undoubtedly proved by such evidence and that could

be done only during trial and not at this stage. I would not like to express any opinion at this stage whether or not the case would ultimately fall under section 302 of Indian Penal Code, as submitted by Mr.Mundargi. However, fact remains that, according to the prosecution, the skidding of the motor cycle was an effect of the firing by the co-accused. The alleged motive attributed to the present applicant was undoubtedly very strong. The applicant and the deceased both were admittedly arrested in the N.D.P.S. case. However, at later stage the deceased was discharged and shown as witness in the said case. Prima facie, I find merit in the submissions of the learned A.P.P. that to shut deceased - Shahaji off from giving evidence in the said case the conspiracy was hatched in the jail and the applicant ultimately succeeded in achieving its object. The N.D.P.S. case against the applicant was ultimately ended in his acquittal. The prosecution has placed on record the statement of one Nisar Ahmed Hussain Shaikh recorded under section 164 of Criminal Procedure Code. Nisar has made a categoric reference to the applicant and the occurence, supporting the prosecution case against the applicant. If the statements of the eye

witnesses, the wife and brother of the deceased and of Nisar under section 164 of Criminal Procedure Code are examined in the backdrop of the alleged motive, in my opinion, that would be sufficient to show complicity of the applicant. The evidenciary value of this evidence would be tested during the trial. The judgment of the Apex Court relied on by the applicant in **Suresh B. Kalani Vs. State of Maharashtra, 1998 S.C.C. (Cri.) 1625** would not help him at this stage more particularly in view of the fact that the application of the applicant seeking discharge had been rejected earlier. In my opinion, the applicant who allegedly hatched the conspiracy to do away with Shahaji only to shut him off from giving evidence against him in N.D.P.S. case and considering that ultimately he achieved the object, he does not deserve discretionary relief under section 439 of the Code of Criminal Procedure. The application is, therefore, rejected. The trial is expedited.

. While passing this order I shall not be understood to have expressed any opinion on merits of the case and the Sessions Court shall deal with the case as well as bail applications, if any,

filed by the applicants uninfluenced by the observations made in this order.

. The application is disposed of.

(D.B.Bhosale, J.)